Supreme Court, U.S.
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No. 98-1703

In the

Supreme Court of the United States

October Term, 1998

JOHN C. BRAZELL,

Petitioner,

-v-

SAVANNAH ELECTRIC AND POWER COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT THAT THE EMPLOYER DISCRIMATED AGAINST THE PETITIONER DUE TO HiS AGE, A PRETEXT BASIS, RESULTING IN WRONGFUL TERMINATION?

II. WHETHER THE UNION FAILED TO REPRESENT PETITIONER IN A FAIR MANNER THEREBY BREACHING ITS FIDUCIARY DUTY?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is set forth in the Appendix, p. 1a and is reported at 166 F. 3rd 154. The opinion of the United States District Court for the Southern District of Georgia Savannah Division dated May 8, 1998 is set forth in the Appendix, p. 2a and is unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eleventh Circuit issued its Decision in this case on December 15, 1998. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on February 17, 1998. This Petition was timely filed within 90 days of the panel rehearing denial, and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

1. **Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. Sections 621, *et. seq***

29 U.S.C. Section 621 provides:

Section 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that --

in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commence and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

2. Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. Sections 623(a)(1).

29 U.S.C. Section 623(a)(1) provides:

Section 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;...

3. **Labor Management Relations Act, 29 U.S.C. Section 185, *et. seq.***

29 U.S.C. Section 185 provides:

Section 185. Suits by and against labor organizations.

Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having

> jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties...

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq.

42 U.S.C. Section 2000e provides:

Section 2000e. Unlawful employment practices

> Employer practices. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

John C. Brazell (hereinafter referred to as the "Petitioner") was employed by Savannah Electric and Power

Company (hereinafter referred to as the "Employer") effective June 30, 1983, at the age of forty-five.

During his employment, the Petitioner was promoted and his work was never scrutinized. Also, he was a member of the local union during a period of his employment.

On January 1, 1994, the Petitioner refused an early retirement plan from the Employer. At that time, the Petitioner was the oldest field representative and at the top of the pay scale.

On August 1, 1996, the Employer terminated the Petitioner's employment based upon false and unjustifiable accusations made on January 5, 1996 and during the week of July 22nd to the 26th, 1996. At this time, the Petitioner was fifty-eight years old.

The union refused to assist the Petitioner with respect to his wrongful termination based upon unrelated personal reasons as well as the Petitioner's relationship with the union's president.

On March 27, 1997, the Petitioner filed a complaint in the United States District Court for the Southern District of Georgia Savannah Division against his former Employer alleging that he was terminated on account of his age in violation of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. Sections 612, *et. seq.*[1] The Petitioner also alleged that his termination was in breach of the

[1]The Petitioner submitted evidence to the court that "age" comments were made to older employees and that the older employees were being forced out of their positions if they did not accept the early retirement plan.

collective bargaining agreement entered into between the Employer and Local 455 of the Office and Professional Employees Union (hereinafter referred to as "Union") in violation of the Labor Management Relations Act, 29 U.S.C. Section 185.[2]

The Employer filed a Motion for Summary Judgment on November 7, 1997, and the Petitioner promptly filed an Opposition. On May 8, the District Court granted the Employer's Motion and judgment was entered on May 11, 1998.

The Petitioner filed a Notice of Appeal to the United States Court of Appeals of the Eleventh Circuit. The Court of Appeals affirmed the District Court's opinion.

The Petitioner has filed a Petition for Certiorari based upon the issues and argument presented herein.

ARGUMENT

I. THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGMENT THAT THE EMPLOYER DISCRIMINATED AGAINST THE PETITIONER DUE TO HIS AGE, A PRETEXT BASIS, RESULTING IN WRONGFUL TERMINATION.

It is unlawful for an employer to fail to hire or discharge any individual with respect to his compensation,

[2] The union president, who disliked the Petitioner, failed to abide by the grievance process and caused the union executive union board to deny the Petitioner's right to arbitration.

terms, conditions or privileges of employment because of such individual's age. Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. Sections 621, *et. seq*, Section 623(a)(1).

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980).

The Petitioner's case should have never been disposed of upon a summary judgment motion. Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Obviously, the Employer's motive and intent were central issues to the underlying cause of action. Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

> "When there is direct evidence that discrimination was a motivating factor in the challenged employment decision, the appropriate analysis is different from that employed in a case where only circumstantial evidence is available."

Trotter v. Board of Trustees of University of Alabama, 91 F.3d 1449, 1453 (11th Cir. 1996); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 961 (11th Cir. 1997); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir.), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984); *Earley v. Champion International Corp.*, 907 F.2d

1077, 1081 (11th Cir. 1990); by presenting circumstantial evidence which complies with the test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)[3]; or by presenting a statistical pattern of discrimination. *Earley* at 1081.

The Petitioner submitted evidence that age discrimination was common practice of the Employer. Two other employees, James Ray and Hugh Reynolds, ages sixty-five and fifty-four, also complained of the Employer's behavior. Mr. Ray was constantly reminded of his age and that he could retire and someone else could replace him. Mr. Reynolds testified that during a physical examination prompted by the Employer because he refused to work twelve-hour shifts, the physician informed Mr. Reynolds of the Employer's early retirement opportunities.

It is obvious from the Petitioner's evidence that the Employer used age to force employees over the age of fifty-five to seek other opportunities.

The District Court's opinion which was affirmed by the Circuit Court of Appeals erroneously stated that the

[3] In *McDonnell Douglas*, the Court established a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases. The plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff.

Employer's remarks toward Mr. Ray and Mr. Reynolds is not direct evidence of age discrimination. The lower courts erroneously marked the Petitioner's claim as an "indirect" evidence case thereby forcing the Petitioner to prove by a preponderance of the evidence his allegations. The lower courts erred in stating that the Employer articulated a legitimate, non-discriminatory reason for terminating the Petitioner's employment, and that the Petitioner failed to provide evidence that the Petitioner's reason was merely a pretext for discrimination.

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994). The Petitioner provided direct evidence of his complaint with his own sworn affidavit and testimony. He further supported his contentions with indirect evidence of the Employer's acts towards workers over the age of fifty-five. The lower courts erred in stating that the comments made to Mr. Ray and Mr. Reynolds were irrelevant in the Petitioner's claim of age discrimination. The statements clearly exemplify the Employer's course of dealing with employees over the age of fifty-five.

In order to distract the court from the age discrimination issue, the Employer used harassment allegations as the cause of the Petitioner's discharge. The Petitioner traveled during the course of the day during his employment and often ate at local hospital cafeterias during lunch. The Employer attempted to circumvent the age discrimination by alleging that the Petitioner harassed a bank employee in the bank parking lot after seeing her in a local restaurant earlier that morning in January of 1996. After the incident, the Petitioner was placed on a twelve-month probation period. In July of 1996, two hospital workers made false complaints that the

Petitioner followed and bothered them in the hospital cafeteria. Causing a rumor to spread, which resulted in a complaint to the employer. None of the allegations were supported by sworn affidavits. The hospital worker making the complaint later recanted. Both incidents involved a women that the Petitioner had a previous relationship with.

The Petitioner was replaced by a thirty-one year old less experienced worker which further supports the Petitioner's proposition that his employment was terminated due to his age. In *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), the Court held that the fact that a replacement was substantially younger than the plaintiff was a far more reliable indicator of age discrimination under ADEA.

Most important, the Court should accept this Petition for Certiorari since the cases referred to by the lower courts were matters strictly based on Title VII,[4] the Civil Rights Act

[4] Under Title VII of the Civil rights Act of 1964 (42 USCS 2000e, et. seq.), the following series of shifting evidentiary burdens applies in a disparate treatment case, which involves an individual's allegation that an employer has treated a particular person less favorably than others because of the person's race, color, religion, sex, or national origin: (1) the plaintiff has the burden of establishing a prima facie case; (2) the defendant employer then bears the burden of production in rebutting the plaintiff's prima facie case, which the employer may accomplish by producing some evidence that it had legitimate nondiscriminatory reasons for the employer's decision; (3) if the employer carriers this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the employer were a pretext for discrimination. *Watson v. Fort*

which focuses on a person's race, color, religion, sex or national origin, instead of age under the ADEA. Courts have only *assumed* that Title VII's McDonnell Douglas framework is applicable to ADEA cases. (*emphasis added). O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). The Court should analyze the present issues and determine whether the analysis and burdens of proof should be the same between Title VII and ADEA. In Title VII cases, the courts apply either a subjective or discretionary employment practices disparate impact analysis, which involves the question whether an employer has engaged in facially neutral employment practices that have significant adverse effects on protected groups, which analysis focuses on statistical disparities, rather than specific incidents. *Watson, supra.*

In the present case, the Court needs to focus on the specific incident as well as the disparity that the three elder men experienced compared to those under fifty-five who are employed with the Employer. This evidence provides adequate inferences that an employment decision was based on an illegal discriminatory criterion. *Teamsters v. United States*, 431 U.S. 324, 358, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). The Fourth Circuit Court of Appeals was reversed by the Court in the *O'Conner* case, *supra*, because the Court held that the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class. If the Court feels that there must be a discriminatory intent or motive proven when there is a specific incident, then, this is the proper case to compare an age discrimination case under ADEA to a Title

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Worth Bank & Trust, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

VII discrimination case. The Petitioner believes that in any event if ADEA's actions are analyzed to Title VII actions, then he has met his burden of proof as well as offered evidence of the pretext for discrimination.

If the two statutes are analyzed similarly, then, the Petitioner's burden of proof will lessen since facially neutral employment practices that have significant adverse effects on protected groups violate the statute without proof that the employer adopted those practices with a discriminatory intent. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), 453 U.S. 902 (1981).

In a Title VII case, when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII, and then, the shifting burden of proofs cease. *Burdine, supra*, at 255.

In our case, if the comparison of the two statutes are made, then since the Employer failed to meet his burden of proof as discussed above, then, the District Court should have denied the summary judgment motion and have had a factfinder be the ultimate decisionmaker. The Petitioner did not have an adequate opportunity to demonstrate that the Employer's proffered reason was not the true reason for the employment decision, but rather a pretext. *Burdine, supra* at 256.

Therefore, it is imperative to accept the Petitioner's Petition for Certiorari and decide whether ADEA and Title VII cases should be analyzed similarly or differently since age

is not a class in Title VII cases and since the District Court and the Circuit Court of Appeals for the Eleventh Circuit focused on Title VII cases to determine an ADEA issue.

II. THE UNION FAILED TO REPRESENT PETITIONER IN A FAIR MANNER THEREBY BREACHING ITS FIDUCIARY DUTY.

Labor Management Relations Act, 29 U.S.C. Section 185 provides a forum and remedy for those injured by the wrongdoings of the union and the employer.

The Petitioner was injured by both the Employer and the union since they failed to give the Petitioner an arbitration hearing for reasons outside the union contract.

A labor organization has the statutory duty of representing all members of the bargaining unit - both members of the union and nonmembers- in utmost good faith and fairness. *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), *citing, Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); *Ford Motor Company v. Huffman*, 345 U.S. 3330, 3337, 73 S.Ct. 681, 97 L.Ed. 1048 (1953).

The Eleventh Circuit states that in order to establish that the union has breached its duty of fair representation, it must be shown that the union's handling of the grievance was either "arbitrary, discriminatory, or in bad faith". *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206 (11th Cir. 1982). The lower court erred in stating that the Petitioner failed to present sufficient evidence that his discharge was a breach of the labor agreement between the Employer and the

Union which allows termination only for just cause, and that the Union breached its duty of fair representation to the Petitioner implied into that agreement by the federal labor relations scheme. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988).

It was wrongful for the union to consider the Petitioner's lack of union membership in denying his grievance to arbitration. *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 110 S.Ct. 424, 107 L.Ed2d 388, 403 (1989).

The Petitioner was forced to agree to have several of the grievance processes combined in exchange for an arbitration hearing. The Petitioner agreed to the shortened process but was denied an arbitration hearing due to the Union's President's, Bobby Long, personal animosity towards the Petitioner. Mr. Long told the Petitioner that the Employer would deny the arbitration request so it was not necessary to have a meeting with the Employer.

To be nonarbitrary, there should be no speculation that the decision not to arbitrate the grievance was based upon personal animosity or hostility. *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976).

Furthermore, the union had a duty of fair representation that required that it exercise its discretion with "complete good faith and honesty". *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903 (1967).

In our present case, there was a breach of the good faith and honesty duty. The Court should consider the Petition for Certiorari on this issue to determine whether personal differences between the union president and a complainant

and the personal differences had a direct impact on an unfair grievance process, is a violation of the Labors Management Relations Act.

CONCLUSION

The Court should grant *certiorari* to review this important matter and reverse the Eleventh Circuit and order that the petitioner was discriminated against based upon his age. More importantly, the Court should decide whether cases brought under ADEA should follow the same analysis and holdings of cases brought under Title VII. Also, the Court should determine the extent of the violation of the Labors Management Relations Act when personal differences circumvents the grievance process.

Respectfully Submitted,

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(Any footnotes trail end of each document)

Brazell v. Savannah Elect. & Power

98-8739

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

December 15, 1998, Decided
NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: United States District Court for the Southern District of Georgia. 97-00062-CV-4.

OPINION: Affirmed

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JOHN C. BRAZELL,
Plaintiff,

vs.

SAVANNAH ELECTRIC AND POWER
COMPANY,
Defendant.

Filed: May 5, 1998
ORDER

Plaintiff John C. Brazell brings this discrimination claim against Defendant Savannah Electric and Power Company ("SEPCO") alleging that he was terminated on account of hi. age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec 612 et seg., and that his termination was in breach of the collective bargaining agreement between SEPCO and Local 455, office and Professional Employees Union (hereinafter "Union" or "PEIU"),in violation of Section 301 of the Labor Management Relations Act, as amended ("LMRA"), 29 U.S.C. Sec. 185. Presently before the Court is SEPCO's Motion for Summary Judgment. Having carefully considered the parties' briefs and the applicable law, the Court grants SEPCO's motion for the reasons set forth below.

FACTS

Both parties have provided the Court with extensive factual information regarding Brazell's relatively straightforward claims. Unless otherwise indicated, the following relevant facts are not in dispute.

A. Background

Plaintiff Brazell was hired by Defendant SEPCO as an Engineering Aide on June 30, 1983, just two days shy of his 45th birthday. In November 1987, Brazell was promoted up to the classification of "Field Representative I" an hourly-paid position in the SEPCO Engineering Department covered under the terms and provisions of the collective bargaining agreements between SEPCO and OPEIU Local 455. At the time of his termination on or about August 1, 1996, Brazell was' directly supervised by Richard Purcell (Supervisor, Transmission Engineering & Construction), who in turn reported to Tom Tennille (General Manager, Engineering).

On January 1, 1994, SEPCO initiated a major reduction in its overall workforce wherein seventy-three employees ages 55 and older and with a minimum of 10 years of service were given theopportunity to voluntarily select early retirement. Fifty-eight such employees chose to retire at that time. Fifteen eligible employees, including Brazell,elected not to accept early retirement packages offered to them and continued to work for SEPCO.

B. Events Leading to Brazell's Discharge

On or about January 5, 1996, SEPCO received a customer complaint about Brazell from the manager of a First Union Bank branch located on East Victory Drive in Savannah.fn1 Soon after, SEPCO Human Resources

Representative Louise Scott went to the bank to investigate the complaint, and interviewed a female employee and her supervisor.fn2 The bank employee reported that Brazell had followed her car from a nearby restaurant to the bank on Friday morning, January 5; that he had parked his SEPCO truck next to where she was seated in her car waiting for the building to be unlocked and had motioned to her to roll down her window; and that he then informed the employee that he had seen her at the restaurant, thought she was "attractive," and had followed her car to see where she worked and to learn if she was married. At this point, a bank supervisor or arrived and recognized Brazell, whom she had known previously.

Brazell contends that he did not follow the female bank employee from the restaurant, but that he observed her in traffic after they both left the restaurant, and drove to the bank parking lot because he thought she worked there. He admits that he purposely parked next to her car in his SEPCO truck, told her he had seen her earlier at the restaurant and then asked if she was married. (Brazell Dep. at 39-54).

On Monday, January 8, Louise Scott discussed the January 5 incident with Human Resources Director Jim Melton and Engineering General Manager Tom Tennille and was instructed to meet with Brazell to ascertain his version of the incident. On Tuesday, January 9, Scott interviewed Brazell in the presence of Supervisor Richard Purcell. As noted earlier, his version of the January 5 incident did not differ materially from the version reported by the female bank employee. Scott informed Brazell that a written incident report would be provided to Purcell and that subsequent disciplinary action might be taken. On Wednesday, January 24, Brazell met with Supervisor Purcell who gave him a disciplinary "reminder" memorandum with an attached investigation summary,

plus an excerpt from the SEPCO Statement of Principles on Corporate Ethics Policy, which sets forth a code of conduct for SEPCO and its employees. Brazell then was informed by his supervisor that he was on probation for a 12-month period and that similar conduct by him during that year could result in disciplinary action up to and including termination. Brazell signed the disciplinary memorandum and a copy was placed in his personnel file.

On or about Thursday, July 25, SEPCO received a second customer complaint about Brazell, this time from the security department at the Memorial Medical Center ("Memorial") in Savannah. Two female Memorial employees had complained about Brazell following and bothering them in and about the hospital cafeteria and gift shop, and Brazell was asked by security to leave and not return to the Memorial premises. Security observed Brazell depart in his SEPCO truck.

This complaint subsequently was investigated by Human Resources Representative Ron Morgan who went to the hospital and conducted separate interviews with both women employees and Security Officer Jesse Byrd. At Morgan's request, the two women prepared written statements confirming that Brazell had followed them about the hospital and that he made them extremely nervous with his actions and general demeanor. Byrd informed Morgan that Byrd had confronted Brazell in the hospital on July 25 concerning the employee complaints, and that Brazell became angry, denied the complaints and initially refused to leave Memorial premises claiming the hospital was public property. Byrd also informed Morgan that the Memorial security department had learned from the security department at St. Joseph's Hospital that Brazell previously had had similar problems at St.

Joseph's in May of 1996. Morgan later confirmed the St. Joseph's complaints during a meet at St. Joseph's with Security Officer Alex Barbee, who informed him of similar incidents involving Brazell and two female employees at that hospital:

Brazell denies the female hospital employees' accusations and contends that the female employees at both hospitals conspired together to make it appear that he was stalking women when in fact he was not. (Brazell Dep. at 121-25) Although Brazell disagrees with many of the details contained in the written incident reports, Brazell nonetheless admits to having had a verbal confrontation with a Memorial security guard on or about Thursday, July 25. Brazell also admits to having been asked by St. Joseph's security officer Barbee in May of 1996 not to have lunch in the St. Joseph's cafeteria in the future because of problems experienced with one or more female employees at that hospital. (Brazell Dep. at 75, 80-88).

On or before, Wednesday, July 31, Morgan discussed the results of his investigation at Memorial and St. Joseph's hospitals with H.R. Director Melton and Engineering General Manager Tennille. On July 31, H.R. Director Melton "made the decision to terminate Brazell's employment with SEPCO on the ground that Brazell had engaged in improper behavior involving female employees at both Memorial and St. Joseph's and, therefore, had violated the terms of the written warning given to him by his supervisor in January of 1996, as well as the SEPCO ethics policy. Brazell was terminated at a July 31 meeting with H.R. Director Melton, Engineering General Manager Tennille and SEPCO employee Bobby Long (OPEIU Local 455 President), who was present at Brazell's request. Melton's involvement with Brazell's termination ended at this point. (Melton Aff. Par 9). At the time of

his termination, Brazell was 58 years old. He subsequently was replaced by a 31 year-old employee.

Brazell was not the only SEPCO employee discharged in 1996 for a violation of SEPCO's corporate ethics policy. On or about June14, 1996, a 34-year old employee was discharged by Vice President Larry Porter after entering a no contendere plea on a statutory rape charge, paying a fine and being placed on probation by a state court. (Melton Aff. Par. 10). However, Brazell points to two alleged incidents involving employees James Ray and Hugh Reynolds, ages 65 and 54, that Brazell asserts demonstrate SEPCO's less favorable treatment of older employees. First, when employee Ray was transferred to another supervisory position at SEPCO, Manager Tennille allegedly told Ray that he "had turned 65 years old and could retire at any time and (SEPCO) wanted somebody else to get the feeling of the job." (Ray Dep. at 5-8). Second, employee Reynolds alleged during his deposition that SEPCO management sent him for a physical examination after he refused to work 12-house shifts, and that during that exam, the doctor allegedly informed Reynolds of SEPCO's early retirement opportunities. (Reynolds Dep.at 5-6, 14-15, 23-24).

C. Post Discharge Grievance Procedure

Local 455 President Bobby Long submitted a written grievance on Brazell's behalf on August 1. On or after Friday, August 2, Long and Local 455 officer Steve Clearman went to Memorial to conduct an independent investigation of the customer complaint against Brazell. On this occasion, they met and talked with Security officer Jesse Byrd and the two female employees who had previously complained about Brazell's activities in and about the Memorial gift shop and

cafeteria. Shortly thereafter, Byrd provided to Long and H.R. Representative Ron Morgan copies of a one-page statement signed by the two female employees plus copies of his investigation report.

On August 26, a meeting with SEPCO Vice Presidents Larry Porter and Kirby Willis was held to discuss Brazell's grievance. President Long and Brazell agreed to this one evidentiary meeting which combined the third and fourth steps of the contractual grievance procedure under the OPEIU labor agreement. Brazell contends that he reluctantly agreed to this combined meeting because Long had promised that Brazell's claim would proceed to arbitration under the OPEIU labor agreement. (Brazell Dep. at 148,150-51, 163). Brazell also believed that his grievance would be rejected by SEPCO management so there was no need for an additional meeting. (Brazell Dep. at 160-163). Long, on the other hand, denies that he ever committed the Union to arbitrating Brazell's claim. At the conclusion of the August 26 grievance meeting, Brazell indicated no dissatisfaction with the representation provided to him by Local 455 president Long. On September 18, Long was sent a letter by Vice President Porter advising the Union that Brazell's grievance was being denied.

During this period, on September 10, although Brazell contends that Long had already committed to arbitrate his claim, Brazell attended a meeting of the Union Executive Board, at Long's invitation, to make an oral presentation as to why his discharge grievance should be arbitrated if denied by SEPCO management. The Executive Board consisted of Steve Clearman, Carolyn Hyslop and three other SEPCO employees (but not president Long). During his presentation of 45 minutes or more, Brazell discussed his belief that the

reason he had been banned from St. Joseph's Hospital was because of false complaints made against him by his former girlfriend. He also explained his verbal confrontation with the Memorial security guard in late July, which he attributed to a "misunderstanding of his conversations with female employees in the gift shop." At least one Board member found that Brazell's explanations were not credible. (Hyslop Aff. Par. 4). At no time during this Executive Board meeting was Brazell told that his grievance would be taken to arbitration by the Union if rejected by SEPCO.

On Tuesday, October 1, the Union Executive Board met and voted unanimously not to arbitrate Brazell's discharge grievance. President Long was in attendance at that meeting, but he did not vote. Although Long is alleged to have expressed a belief to a past Union president that Brazell's non-membership in the Union might hinder his chance for a favorable arbitration vote (Feldmann Aff. at 9), there is no evidence that Brazell's non-membership in fact played any role in the Board's decision. Rather, the Board members considered their knowledge of the facts surrounding Brazell's discharge, including the incident involving Brazell and the female bank employee in January of 1996, and the fact that he was on disciplinary probation for that earlier incident when the hospital incidents occurred, as well as Brazell's presentation of him version of events. (Clearman Aff.; Hyslop Aff.). The Board also considered the likelihood that Brazell would prevail through arbitration of his wrongful discharge claim. (Pl.'s Resp. Ex. K).

The Board's decision not to arbitrate was not out of the ordinary. In recent years, Local 455 had declined to take to arbitration other grievances that the Union Executive Board considered to be without merit, including several

grievances filed by Local 455 members. (Long Aff. Par. 14; Clearman Aff. Par. 3). In particular, the Union refused to arbitrate the December 1993 discharge of a mail clerk in the SEPCO Building Services Department who was a Local 455 member at that time. (Long Aff. Par 14; Clearman Aff. Par 3). No SEPCO official or other representative had any involvement with the Union Executive Board's decision not to seek arbitration of Brazell's grievance. (Melton Af f. Par 9).

Brazell brought this action claiming that (1) SEPCO terminated his employment without justification and in violation of the ADEA; (2) he violated no SEPCO policy prior to that date to justify disciplinary action; (3) younger SEPCO employees have not been terminated for similar or more serious policy violations than he is alleged to have violated; and (4) his 1996 termination constituted a breach of the collective bargaining agreement then in existence between SEPCO and OPEIU Local 455. SEPCO counters that Brazell's termination was for a legitimate non-discriminatory business reason and that his age was in no way a factor in the decision. SEPCO further avers that Brazell's termination of employment did not breach its collective bargaining agreement with the Union and did not constitute a violation of Sec 301 of the LMRA.

DISCUSSION

I When Summary Judgment Is Appropriate

In assessing whether SEPCO is entitled to summary judgment in its favor, the Court must review the evidence and reasonable factual inferences arising from it in the light most favorable to Brazell. See Welch v. Celotex Corp., 951 F.2d

1235, 1237 (11th Cir. 1992). The Court must avoid weighing conflicting evidence during this endeavor. See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). Where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." Barfield v. Brierton, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). However, if the evidence is merely colorable or not significantly probative, summary judgment may be granted. See id.

Courts in this jurisdiction adhere to the principle that employment discrimination cases should be disposed of at summary judgment only with "extreme caution." See Beard v. Annis, 730 F.2d 741, 743 (11th Cir. 1984); Hodges v. Stone Savannah River Pulp & Paper Corp., 892 F. Supp. 1571, 1576 (S.D. Ga. 1995).

II Brazell's ADEA Claim Cannot Survive Summary Judgment

SEPCO contends that there is no dispute of material fact as to whether SEPCO discriminated against Brazell on the basis of his age. The Court agrees.

Discrimination can be proved with direct or indirect evidence. See Meeks v. Computer Data Assoc. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994); Goldsmith v. City of Atmore, 996 F.2d 1155, 1162-63 (11th Cir. 1993). Because Brazell has failed to adduce any direct evidence that his termination was the result of discriminatory intent, this is an indirect evidence case.fn5

An indirect evidence case involves a three-tiered, burden-shifting analysis. Tier one requires Brazell to establish a prima facie case of discrimination by a preponderance of the evidence. Once Brazell has successfully made a prima facie showing, tier two shifts the burden of production to SEPCO to articulate, not prove, a legitimate, non-discriminatory reason for the treatment alleged. See Hodges, 892 F. Supp. at 1577 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).fn6 SEPCO's burden in this regard is exceedingly light. See Quarles v. McDuffie County, 949 F. Supp. 846, 853 (S.D. Ga. 1996) (citing Meeks). Should SEPCO carry this burden, Brazell has the opportunity at tier three to demonstrate by a preponderance of the evidence that the reason proffered by SEPCO is not a true reason, but merely pretext for discrimination. See Hodges 892 F. Supp. at 1577-78. Despite the shifting burdens of proof, the ultimate burden of persuasion remains at all times with Brazell. See id. (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980)).

Assuming, without deciding, that Brazell has established a prima facie case of age discrimination, fn7 SEPCO clearly has met its burden of articulating a legitimate, non-discriminatory reason for terminating Brazell. There is substantial, credible evidence that Brazell had behaved inappropriately toward female employees of two local hospitals while on probation for a similar incident six months earlier. More importantly, however, SEPCO has more than demonstrated a good faith belief that those incidents occurred and constituted good cause for Brazell's termination. As SEPCO correctly asserts, an employer may successfully rebut a prima facie case "by showing that it honestly believed the employee committed the violation." Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989); accord Elrod v. Sears. Roebuck & Co.,

939 F.2d 1466, 1470 (11th Cir. 1991) ("The inquiry of the ADEA is limited to whether (the employer] believed that [the plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [the plaintiff's] discharge.").

Thus, it becomes Brazell's burden at tier-three to come forward with sufficient evidence that SEPCO's termination decision was in some way motivated by age, and thereby a pretext for discrimination. As a preliminary matter, the Court notes that, despite SEPCO's citations to the contrary, "[u]nder the established rule of this Circuit, a plaintiff can survive a motion for summary judgment . . . simply by presenting evidence sufficient to demonstrate a genuine issue of material fact as to the truth or falsity of the employer's legitimate, nondiscriminatory reasons." Evans v. McClain of Georgia, 131 F.3d 957, 964-65 (11th Cir. 1997)(citing Combs v. Plantation patterns, 106 F.3d 1519, 1530-32 (11th Cir. 1997), cert. denied, 118 5. Ct. 685 (1998)). At this stage, the evidence need not also indicate that discrimination was the true reason for Brazell's discharge. Id. Brazell nonetheless has failed to meet even this minimal burden.

Outside of Brazell's conclusory assertions that he was terminated on account of his age, Brazell has not disputed that SEPCO management had a good faith belief that Brazell had engaged in inappropriate behavior. Rather, Brazell argues that he did not, as a matter of fact, engage in any misconduct at the hospitals. Brazell's argument is not relevant to the Court's evaluation of his ADEA claim, however. As noted earlier, "(the inquiry into pretext centers upon the employer's beliefs . . . ," and not whether Brazell did, in fact, harass or otherwise bother female employees at the hospitals. Holifield v. Reno, 115 F.3d 1555, 1565 (11th Cir. 1997); see also O'Connor v. DePaul Univ., 123 F.3d 665, 670 (7th Cir.

1997) ("For purposes of the ADEA, we must not be concerned with whether the decision was right or wrong1 fair or unfair, well-considered or precipitous. We must look only at whether the reason was discriminatory or, in the pretext analysis, whether it actually did underlie the plaintiff's termination.").

SEPCO has submitted affidavits from every member of SEPCO management involved with the decision to terminate Brazell, as well as from those individuals who investigated the incident, and the Union officials involved in the grievance process. Those affidavits, unrebutted by Brazell, conclusively establish a good faith belief on the part of SEPCO that Brazell had engaged in inappropriate behavior, and that such conduct formed the basis for his discharge. Their belief is particularly reasonable in light of Brazell's undisputed misconduct six months earlier. Thus, Brazell's "[c]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the defendant] has offered extensive evidence of a legitimate, non-discriminatory reason for its actions." Isenbergh v. Knight-Ridder Newspaper Saless Inc., 97 F.3d 436, 444 (11th Cir. 1996) (citations omitted), cert. denied, 117 5. Ct. 2511 (1997). Brazell's contentions that the alleged misconduct did not occur while he was working and that he was not wearing a uniform at the time, even if true, fail to provide evidence that SEPCO did not believe in good faith that Brazell had behaved inappropriately in violation of his probation.fn9 Moreover, they do not assist Brazell with his obligation to demonstrate some age-based motivation behind his termination.

Moreover, the Court notes that of the fifteen employees eligible for early retirement in 1993 who, like Brazell,

were over age 55 and turned it down, nine are still working for the company more than four years later. This fact provides significant support for an inference that SEPCO does not discriminate against older persons. See Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). The alleged ageist remarks to employees Reynolds and Ray, standing alone, are not suf ficient to dislodge that inference or demonstrate a "willingness to consider . . . impermissible factors." See Mulero-Rodriquez v. Ponte, Inc., 98 F.3d 670, 676 (1st Cir. 1996) (citations omitted). Thus, Brazell does not present evidence sufficient to give rise to an alternate inference that SEPCO's decision to terminate Brazell was motivated by a discriminatory intent. Furthermore, Brazell was almost 45 years old when hired in 1993 and, therefore, a member of the protected age group. Consistent with this fact, the Court finds persuasive the case law cited by SEPCO that "it hardly makes sense to hire workers from a group one dislikes .. . . only to fire them once they are on the job." Proud, 945 F.2d at 797 (citations omitted); accord Lowey, v. J.P. Hunt Transport, Inc., 963 F.2d 173, 175 (8th Cir. 1992) (finding that it would be "simply incredible" that a company that hired the plaintiff at age fifty-one had "suddenly developed an aversion to older people" and fired him two years later because of his age). Thus, Brazell's protected status on the date he was hired further supports the inference that SEPCO did not terminate his employment in 1996 because of his age. See Proud, 945 F.2d at 797.

Brazell's "other evidence" that discrimination played a role in his discharge similarly creates no dispute of material fact as to his age claim. First, Brazell maintains that he received no training on SEPCO's ethics policy, that the policy sets no objective standards, and that SEPCO did not follow certain disciplinary and grievance steps. Second, Brazell asserts that

SEPCO keeps records of its employees' ages. Third, Brazell asserts that he was replaced by a younger employee. All of these allegations, even if taken as true, fail to provide evidence of a discriminatory pretext.

First, as to Brazell's assertions that SEPCO failed to provide ethics policy training and to follow its disciplinary and grievance procedures, even if true, Brazell has not alleged and there is no evidence to support an inference that younger employees were treated differently in this regard. The fact remains that Brazell was on probation, and SEPCO made a good faith determination that Brazell had violated the terms of that probation.

Second, with respect to Brazell's contention that SEPCO records its employees' ages in personnel documents, most, if not all, United States employers cannot avoid maintaining some record of their employees' birthdates (regardless of their ages) for group insurance, pension plan and other legitimate reasons. Such records do not provide evidence of discrimination. See Earley v. Champion Intern. Corp., 907 F.2d 1077, 1082 (11th Cir. 1990) (holding that personnel documents referring to employee ages and birthdates were not evidence of unlawful intent in a reduction-in-force case).

Finally, Brazell's allegation that he was replaced by a younger employee, while supportive of his undisputed prima facie case, does not provide sufficient evidence that SEPCO's proffered reason for the termination was pretextual. See Combs, 106 F.3d at 1528 (noting that an articulation of a legitimate, non-discriminatory reason from the defendant destroys the inference of discrimination arising from the plaintiff's prima facie case); cf. Elrod, 939 F.2d at 1470-72 (holding that two isolated instances of alleged favoritism

toward younger employees over older employees did not provide evidence of a discriminatory pretext where the employer has offered a legitimate, non-discriminatory reason for its actions toward the plaintiff).

In sum, while it is true that "determinations of motive and intent, particularly in discrimination cases, are questions better suited far the jury." Petitti v. New England Tel. & Tel. Co. 909 F.2d 28, 34 (1st Cir. 1990), Brazell has failed to present evidence sufficient to cast doubt upon SEPCO's legitimate, non-discriminatory reason so as to necessitate a jury determination of SEPCO's termination motive. Regardless of whether SEPCO's termination decision was "right or wrong, fair or unfair, well-considered or precipitous," O'Connor, 123 F.3d at 670, Brazell has produced insufficient evidence that the decision was in any way motivated by Brazell's age. Accordingly, Brazell's ADEA claim must be dismissed.

III. There Is No Dispute of Material Fact as to Brazell's LMRA Claim

SEPCO avers that Brazell's termination did not constitute a violation of Section 301 of the LMRA because the Union did not breach its duty of fair representation to Brazell. The Court agrees

In order to survive summary judgment, Brazell must present sufficient evidence both (1) that his discharge was a breach of the labor agreement between SEPCO and the Union which allows termination only for just cause, and (2) that the Union breached its duty of fair representation to Brazell implied into that agreement by the federal labor

relations scheme. See Parker v. Connors Steel Co., 855 F.2d 1510, 1519 (11th Cir. 1988).

Because the Court has already determined that Brazell's ADEA claim must fail, and Brazell's claim that he was terminated without just cause is based almost entirely on the ADEA allegations, prong one of the LMRA claim is tenuous at best. Both Brazell and SEPCO appear to agree, however, that Brazell's LMRA claim stands or falls on the second prong, namely whether Brazell has presented sufficient evidence that the Union, and its President Bobby Long, breached their duty of good faith and fair representation to Brazell. Accordingly, in an abundance of caution, the Court will evaluate the union's performance of this duty.

Reduced to its essence, Brazell argues that the Union breached this duty through its "perfunctory" handling of Brazell's grievance, through its failure to arbitrate Brazell's claim because Brazell was not a member of the Union, and because of "hostility" toward Brazell by President Long and several other Union Executive Board members. Brazell has an exceedingly difficult row to hoe in establishing a breach of this duty: Brazell must show that the Union's actions were "arbitrary, discriminatory, or done in bad faith." Harris v. Schwerman Trucking Co., 668 F.2d 1204, 1206 (11th Cir. 1982) (citing cases); see Smith v. Babcock & Wilcox Co., 726 F.2d 1562, 1564-65 (11th Cir. 1984) (noting that "a union is allowed considerable latitude in its representation of employees" and accordingly the plaintiff's burden to show that the union breached its duty of fair representation is therefore "a substantial one"). The law is clear that "neither negligence on the part of the union nor a mistake in judgment is sufficient to support a claim that the union acted in an arbitrary and perfunctory manner." Smith, 726 F.2d at 1565.

Brazell has failed to make the requisite evidentiary showing here.

The Court must reject as insufficient Brazell's contentions regarding his acrimonious relationship with Long and other Executive Board members and the alleged perfunctory handling of his grievance. Brazell concedes that he has had no problems with Long since approximately 1992 to 1993. (Brazell Dep. at 30-35). Thus, any hostility between the two men was too remote in time to provide a basis for an allegation of bad faith on the part of Long during the 1996 grievance procedure. In fact, Brazell appears expressly to have requested Long's involvement in the grievance process, contacting Long to assure his presence at a disciplinary meeting with SEPCO management in July of 1996. Long, together with Clearman, conducted a thorough, independent investigation of Brazell's claims, with both men visiting Memorial to interview hospital staff. Moreover, Brazell was given the opportunity to argue the merits of his case to two SEPCO vice-presidents and to the five-member Union Executive Board. These actions on the part of Long and the Union belie Brazell's suggestion that his claim was handled in a perfunctory manner. Furthermore, even if the Court assumed an acrimonious relationship between Long and Brazell, such an assumption does not allow the Court to infer a conspiracy among the Executive Board members, who voted unanimously not to arbitrate Brazell's grievance without Long. Long did not participate in that vote.

As to the allegation that the Union discriminated against Brazell based on his non-union status, Brazell has produced almost no evidence in this regard. Even if Long mentioned to one individual not involved in the Board vote that Long was unsure whether Brazell would obtain an

arbitration vote in his favor because Brazell was not a member of the Union (Feldmann Af f. Par. 9), SEPCO has produced uncontroverted evidence demonstrating that Brazell's non-membership was not even discussed or considered when the Executive Board voted unanimously not to arbitrate the grievance. (Clearman Aff. 5-6; Hyslop Aff. Par 5; Pl.'s Resp. Ex. K). Rather, that decision was based on the Board's evaluation of Brazell's claim, following the Union's independent investigation of SEPCO's termination decision and Brazell's presentation to the Board. (Clearman Aff.; Hyslop Aff.; Pl.'s Resp. Ex. K).

As to Plaintiff's allegation that Long assured him that his termination grievance definitely would be arbitrated, Brazell cites no evidence to support this claim, and has not attempted to refute Long's and Clearman's affidavits to the contrary. In fact, Brazell's contention that Long had promised arbitration is inconsistent with Brazell's own attempts to ensure a favorable Board vote regarding arbitration by making a presentation to the Board and offering to join the Union. Moreover, Brazell had no absolute right to arbitration of his grievance. See Higdon v. United Steelworkers, 537 F. Supp. 653, 659 (S.D. Ga. 1982), aff'd, 706 F.2d 1561 (11th Cir. 1983). Brazell was or should have been aware that a Board vote on the arbitration issue was necessary under the Union rules. A union has considerable discretion to sift out frivolous grievances, to abandon processing of meritless grievances, and settle disputes with an employer short of arbitration. See id. SEPCO has submitted uncontroverted evidence that the Board not only conducted such an evaluation with regard to Brazell's claim, but also has declined to take other grievances to arbitration that the Board deemed to be meritless.

In sum, Brazell has failed to present sufficient evidence that the Union breached its duty of fair representation, and thus his LRRA claim must fail.

CONCLUSION

As noted earlier, courts in the Southern District of Georgia dispose of employment discrimination claims at the summary judgment stage only with extreme caution. Caution alone cannot save Brazell's deficient claims, however, both under the ADEA and the LMRA. The facts alleged by Brazell, even if true, simply do not give rise to liability on the part of SEPCO. Accordingly, the Court hereby GRANTS SEPCO's motion (Doc. 19), and Brazell's claims are DISMISSED. The Clerk is DIRECTED to CLOSE this case.

SO ORDERED, this day of May, 1998.

WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

Footnotes

1 Hereinafter, all dates refer to 1996 unless otherwise noted.

2 Both bank employees wished to remain anonymous for fear of possible reprisals.

3 Apparently, Brazell used to date a woman employed at St. Joseph's, and it is his contention that she is in some way behind the female employee complaints at both hospitals.

4 Also during this period, Brazell appears to have offered to become a Union member because he though membership would aid his chances of receiving arbitration of his claim. (Pl.'s Resp. to Def.'s Mot. Summ. J., Ex. G, Feldmann Aff. Par 10). Brazell's effort supports SEPCO's contention that Brazell had not been promised arbitration.

5 Brazell's argument that SEPCO's alleged age-related mistreatments of Reynolds and Ray constitutes "direct" evidence is misguided. "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age...constitute direct evidence of discrimination." Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989); accord Young v. General Foods Corp., 840 F. 2d 825, 829 (11th Cir. 1988) ("[N]ot every comment concerning a person's age presents direct evidence of discrimination.") The two alleged age-related comments to employees Ray and Reynolds appear seemingly innocuous to the Court. Moreover, the remarks have no apparent nexus to SEPCO's decision to terminate Brazell. See Cone v. Longmont United Hospoital Assoc., 14 F. 3d 526, 531 (10th Cir. 1994) (holding that ageist comments made to other employees must bear some relation to the discriminatory treatment at issue before the court). Even if they may be construed as evidence of a discrimnatory intent, however, they are not statements that can be attributed to SEPCO for purposes of ADEA liability in Brazell's claim because in both instances they were not made by an adverse-decisionmaker. See id. (holding that ageist comments made by person who did not participate in the termination decision did not provide direct evidence of discrimination).

6 The Eleventh Circuit has "adapted the [McDonnell Douglas] principles governing the order and allocation of proof in cases arising under Title VII to claims of age discrimination."

Walker v. NationsBank of Florida, N.A., 53 F. 3d 1548, 1556 (11th Cir. 1995); accord Turlington v. Atlanta Gas Light Co., 135 F. 3d 1428 (11th Cir. 1998).

7 SEPCO does not dispute that Brazell minimally has met his burden of establishing a prima facie case.

8 Moreover, the Court has some difficulty identifying the significance of Brazell's contentions in light of the actuality that Brazell was identified by the truck emblazoned with the SEPCO name at the time of the Memorial and bank episodes, prompting staff at both locations to complain to SEPCO about Brazell's conduct.

Filed: 1/21/99

Brazell v. Savannah Elect. & Power

98-8739

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BIRCH, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant JOHN C. BRAZELL is denied

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAY 26 1999
CLERK

No. 98-1703

IN THE

Supreme Court of the United States

JOHN C. BRAZELL,

Petitioner,

v.

SAVANNAH ELECTRIC AND POWER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court has jurisdiction over the instant petition inasmuch as said petition was not filed within 90 days of the date of the denial of the petition for rehearing in the Court of Appeals?

Whether the District Court and Court of Appeals correctly determined that Respondent was entitled to summary judgment on Petitioner's age discrimination claim where Petitioner failed to produce any relevant evidence from which a reasonable factfinder could conclude that Respondent's legitimate, nondiscriminatory reason for his July 31, 1996 discharge was a mere pretext for age discrimination?

Whether the District Court and Court of Appeals correctly determined that Respondent was entitled to summary judgment on Petitioner's Section 301 claim where Petitioner failed to produce any relevant evidence from which a reasonable factfinder could conclude that his collective bargaining agent breached its duty of fair representation?

PARTIES TO THE PROCEEDING

The parties to the proceeding include John C. Brazell, Petitioner, and Savannah Electric and Power Company, Respondent. In addition, the parent company of Respondent Savannah Electric and Power Company is the Southern Company headquartered in Atlanta, Georgia, and there are no other publicly held companies that own 10% or more of the stock of the Respondent.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's petition for rehearing, is unpublished and is reproduced at "Appendix A" of this Response. The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the District Court's decision, is reported at 166 F.3d 354 and is reproduced at page 1a of the appendix of the petition. The opinion of the United States District Court for the Southern District of Georgia, Savannah Division, is unpublished and is reproduced at pages 2a through 23a of the appendix of the petition.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to entertain the petition. The Court of Appeals denied Petitioner's petition for rehearing on January 21, 1999, *not* February 17, 1998 as alleged by Petitioner. (Appendix A hereto; petition, p. 1). Petitioner did not file his Petition for Writ of Certiorari until April 23, 1999, 92 days later. As such, the petition was untimely filed and this Court has no jurisdiction over it. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.

STATEMENT OF THE CASE

This is a simple, straightforward case involving the application of undisputed facts to well-settled law. Indeed, this case involves the discharge of a 58-year-old male employee for repeated acts of misconduct and his labor union's subsequent decision not to arbitrate a meritless grievance filed under the collective bargaining agreement then in effect. Nevertheless, by misstating the facts and

distorting the record, Petitioner is hopeful this Court will divine an issue where none exists. However, as will be demonstrated, there is no cause for this Court's review of this case which involves neither a conflicting decision nor an erroneous finding.

The relevant facts are accurately set forth in the District Court's opinion at pages 3a through 10a of the appendix to the petition. Briefly, the events leading to Petitioner's discharge began on or about January 5, 1996 when Respondent received a customer complaint about Petitioner from the manager of a local bank.[1] The complaint involved Petitioner having followed a female bank employee in his company truck and having intimidated her by pulling alongside her personal vehicle and then telling her he had followed her to discover where she worked and to learn if she was married. (R1-20-50-52). After investigating the complaint, including obtaining Petitioner's version of the incident (which did not differ materially from the female bank employee's version), Respondent placed Petitioner on a 12-month probationary period, warned him that any such future misconduct could result in discharge, and issued him a disciplinary memorandum with a copy of Respondent's written ethics policy. (R1-20-52-56; R1-20-28-29; R1-20-59-66; R1-20-69-70; R3-22-39-54; R3-22-54-70).

On or about July 25, Respondent received another customer complaint about Petitioner. This complaint was from the security department at a Savannah hospital and involved Petitioner's following and generally bothering two female hospital employees in and about the hospital cafeteria and gift shop. As with the first complaint,

1. Hereinafter, all dates refer to 1996 unless otherwise noted.

Respondent investigated this second one by interviewing all parties involved, including both women, a uniformed hospital security officer, and the Petitioner. The women signed a written statement confirming that Petitioner had followed them about the hospital and made them extremely nervous. The hospital security officer confirmed the women's complaints; told of his confrontation with Petitioner at the hospital during which he requested that the latter leave the premises; and informed Respondent of yet another, similar complaint about Petitioner received from the security department at another local hospital. (R1-20-37-40; R1-20-29-30; R1-20-70-71; R1-20-94-97; R1-20-102-104; R1-20-43; R1-20-31).

Respondent then contacted the security department at the other Savannah hospital and was, in fact, informed of similar incidents involving Petitioner and two female hospital employees that had occurred there several months earlier. After obtaining this information, Respondent confronted Petitioner and, although he denied the female hospital employees' stalking accusations, he nevertheless admitted to having had a verbal confrontation with the security guard at the first hospital on or about July 25 and, further, to having been asked by the security department at the other hospital in May not to have lunch in their cafeteria in the future because of problems experienced with female employees at that hospital. (R3-22-70-88-91-121).

At the conclusion of this investigation, Respondent's human resources director made the decision to discharge Petitioner for having engaged in improper behavior towards female employees at both Savannah hospitals in violation of the terms of his January 1996 written warning and probation as well as Respondent's ethics policy. Petitioner's

employment was thus terminated effective July 31, 1996. (R1-20-30-31; R1-20-71; R1-20-75-76).

Present at Petitioner's July 31 termination meeting, at his own request, was the union's president, Bobby Long. President Long subsequently submitted a written grievance on Petitioner's behalf and, along with another union officer, conducted an independent investigation of the complaints made against Petitioner by the hospital personnel. In addition, President Long represented Petitioner at his August 26 grievance meeting with two vice presidents of Respondent (with no complaints from Petitioner), and then invited Petitioner to argue his own case for proceeding to arbitration under the labor agreement with Respondent before the union's five-member Executive Board. (President Long was not a member of that Board). Petitioner did so, but the Executive Board subsequently voted unanimously not to arbitrate his grievance based upon its analysis of the facts surrounding Petitioner's discharge and a reasoned determination that he would not prevail at arbitration. (R1-20-76-80; R1-20-85-87; R1-20-97-100; R1-20-40-41; R3-22-125-142; R3-22-144-163; R3-22-164-177). This decision was consistent with the union's practice of recent years not to arbitrate grievances the Executive Board considered meritless, even those of union members. (R1-20-80; R1-20-84-85).

Petitioner subsequently filed suit in District Court alleging that Respondent discharged him in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 612 *et seq.* (hereinafter "ADEA") and also in violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (hereinafter "LMRA"). (R1-1). After full discovery, Respondent moved for summary judgment as to Petitioner's

claims, which was subsequently opposed by his legal counsel. (R1-19-28). In May 1998, the District Court granted Respondent's summary judgment motion and dismissed all claims. (R2-35-36). Petitioner appealed this dismissal to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291. On December 15, 1998, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of Respondent by per curiam decision. Petitioner then filed a petition for rehearing which was denied by the Eleventh Circuit on January 21, 1999. On April 23, 1999, Petitioner filed the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

In addition to the fact that the petition is jurisdictionally out of time, this case simply is not a proper case for which a writ of certiorari should be granted. As discussed below, the lower courts fully considered the undisputed record evidence and correctly applied well-established law to the issues. Moreover, the decision of the District Court does not conflict with controlling decisions of this Court, with the decisions of the Eleventh Circuit Court of Appeals, or with the decisions of other courts of appeals.

I.

THIS COURT LACKS JURISDICTION OVER THE PETITION

As an initial matter, the petition for writ of certiorari should be dismissed on jurisdictional grounds. Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13, a petition for certiorari in a civil case must be filed within 90 days of the

entry of the judgment below or, if a petition for rehearing is timely filed, within 90 days of the denial of the petition for rehearing. In the instant case, Petitioner timely filed a petition for rehearing, which the Eleventh Circuit denied on January 21, 1999. (Appendix A hereto). Thus, the time to file a petition for writ of certiorari began to run on that date, making April 21, 1999 the *last* day on which a petition for writ of certiorari might be timely filed. However, Petitioner, did not file his petition until April 23, 1999. Inasmuch as the 90-day limit is "mandatory and jurisdictional," the Court must dismiss the petition for want of jurisdiction. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

II.

THE LOWER COURTS CORRECTLY DETERMINED THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S AGE DISCRIMINATION CLAIM

A. The lower courts properly concluded that there was no direct evidence of age discrimination

Before the lower courts and here again, Petitioner argues that he presented *direct* evidence of age discrimination. This evidence consists of one alleged comment made to one employee, James Ray, sometime in 1995, and one alleged comment made to another employee, Hugh Reynolds, sometime in 1994. According to Mr. Ray, when he asked his manager why he was being transferred from one supervisory position to another within his department, he was told that since he "had turned 65 years old and . . . could retire at anytime[,] . . . [the company] wanted somebody else to get the feeling of the job."

(R6-32-5-8). The comment directed at Mr. Reynolds came from a company-approved doctor who allegedly told him during a 1994 physical examination that he would be eligible for early retirement in three years. (R7-33-5-6, 15-15, 23-24).[2]

This evidence does not amount to direct evidence of age discrimination in this case. These alleged statements did not involve the Petitioner or his July 31, 1996 discharge and were made, if at all, by persons who did not make or participate in the discharge decision.[3] Indeed, as this Court has recognized, "stray remarks in the workplace . . . , statements by nondecisionmakers, or statements made by decisionmakers unrelated to the decisional process itself" do not constitute direct evidence of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). To the contrary, direct evidence is "evidence, which if believed, proves [the] existence of [the] fact in issue without inference or presumption.

2. These two comments fall far short of establishing that "age discrimination was [the] common practice of the Employer," that "Mr. Ray was constantly reminded of his age and that he could retire and someone else could replace him," or that "older employees were being forced out of their positions if they did not accept the early retirement plan." (Petition, pp. 5, n.1, 8). Furthermore, the record evidence negates any such argument that Respondent was forcing out its older employees. As found by the District Court, of the fifteen employees eligible for early retirement in 1993 who, like Petitioner, were over the age of 55 and declined early retirement, nine were still working for Respondent four years later. (App. to Petition, pp. 14a-15a).

3. Human Resources Director Jim Melton made the discharge decision based on the investigation facts before him. Petitioner's manager merely signed his termination letter as the department head. (R1-20-30-31).

Evidence that merely suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence." *Taylor v. Runyon*, No. 97-3202, Slip op., 1999 U.S. App. LEXIS 8412, *14 (11th Cir. May 4, 1999) (citation and quotation omitted). These statements clearly do not prove that Respondent discharged Petitioner because of his age. To be sure, they do not even suggest that this was the case. Accordingly, the lower courts properly determined that these alleged statements were not direct evidence.

B. The lower courts properly determined that Respondent met its burden of articulating a legitimate, nondiscriminatory reason for discharging Petitioner

In a circumstantial evidence case such as this one, the proof framework created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny applies. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (*McDonnell Douglas* provides proof scheme applicable to ADEA cases); *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995) (same). Thus, once Petitioner established a prima facie case, the burden shifted to Respondent to *articulate* a legitimate, nondiscriminatory reason for the discharge. *McDonnell Douglas*, 411 U.S. at 802. Clearly, notwithstanding Petitioner's contrary, unsupported assertion, Respondent met this exceedingly light burden. *See, e.g.*, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1980) (the defendant need only set forth the reasons for the decision; it need not persuade the court that it was actually motivated by the proffered reasons).

As stated by the District Court,

> [t]here is substantial, credible evidence that [Petitioner] had behaved inappropriately toward female employees of two local hospitals while on probation for a similar incident six months earlier. More importantly, however, [Respondent] has more than demonstrated a good faith belief that those incidents occurred and constituted good cause for [Petitioners's] termination.

(App. to Petition, p. 12a). In fact, as further noted by the District Court,

> [Respondent] has submitted affidavits from every member of [Respondent's] management involved with the decision to terminate [Petitioner], as well as from those individuals who investigated the incident, and the Union officials involved in the grievance process. Those affidavits, unrebutted by [Petitioner], conclusively establish a good faith belief on the part of [Respondent] that [Petitioner] had engaged in inappropriate behavior, and that such conduct formed the basis for his discharge.

(App. to Petition, p. 14a). There is no disputing the fact that Respondent met its burden of articulating a legitimate non-discriminatory reason for Petitioner's discharge.

C. The lower courts properly determined that Petitioner failed to produce any evidence of pretext

Having met its burden of production, the burden of demonstrating pretext fell to Petitioner. *See, e.g., Burdine*, 450 U.S. at 255. Yet, Petitioner failed to produce any evidence from which a reasonable factfinder could conclude that Respondent's legitimate, nondiscriminatory reason for his discharge was a mere pretext for age discrimination. In the courts below and in his petition, Petitioner simply asserts without any record or legal citation or argument that, because the complaints made against him were "false" and because he was subsequently replaced by someone 31 years of age, he has somehow demonstrated pretext. Petitioner, however, has misunderstood his burden.

Inasmuch as "the inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his [behavior]," Petitioner's conclusory claims of innocence simply miss the point. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997); *see also O'Connor v. DePaul Univ.*, 123 F.3d 665, 670 (7th Cir. 1997) ("For purposes of the ADEA, we must not be concerned with whether the decision was right or wrong, fair or unfair, well-considered or precipitous. We must look only at whether the reason was discriminatory or, in the pretext analysis, whether it actually did underlie the plaintiff's termination."); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("The inquiry of the ADEA is limited to whether [the employer] believed that [the plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [the plaintiff's] discharge."). As so aptly found by the District Court, "[Petitioner's] contentions that the alleged misconduct did not occur . . . , even if true, fail to

provide evidence that [Respondent] did not believe in good faith that [Petitioner] had behaved inappropriately in violation of his probation." (App. to Petition, p. 14a). Thus, Petitioner's contentions fail to prove that Respondent was not motivated by the proffered reasons.[4]

As to his eventual replacement by a 31-year old female employee, although this fact may have enabled him to establish a prima facie case, it does not tend to show that the reason given by Respondent was not the true reason for his discharge. This is especially true since the terms of the collective bargaining agreement between Respondent and the union dictated that Petitioner's vacant position would be filled by the most senior, qualified applicant from the bargaining unit and, further, since the discharge

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4. The same is true with respect to Petitioner's assertions that the womens' complaints were not supported by sworn affidavits, that one of the complaints was later recanted, and that the incidents involved women with whom Petitioner had had a relationship. (Petition, p. 10). The complaining women at the first hospital were interviewed and two of them provided a signed statement confirming their complaints. (R1-20-43; R1-20-31). In any event, the fact that affidavits were not obtained simply is irrelevant to the inquiry of whether Respondent believed their accusations. Likewise, whether or not one or more of the women later recanted or had been personally involved with Petitioner has no bearing on the issue inasmuch as there is absolutely no evidence to support these alleged facts and no evidence or even assertion that Respondent was aware of these alleged facts. Furthermore, even if true, these facts would not prove that Respondent did not, in fact, believe that Petitioner engaged in inappropriate conduct, especially in light of his admissions that he did follow and question the bank employee and that he was asked by security personnel at both hospitals to leave the premises due to his misconduct. (R2-29-1-10; R1-21-4).

decisionmaker (Melton) did not even know who or how old that successful applicant might be. (R4-30-21-25; R5-31-21-22). Thus, the age of Petitioner's replacement has no relevance whatsoever to the question of the decisionmaker's motive or the real reason for the discharge.

In the end, Petitioner simply failed to produce any relevant evidence that even remotely suggests that the complaints against him by the hospital personnel were not what actually motivated Respondent to discharge him.[5] Indeed, he does not dispute that the complaints were made; does not dispute that Respondent investigated the complaints; does not dispute many of the substantive complaint allegations, such as his presence at the various bank and hospital locations, interaction with the complaining women, and security officers' requests that he leave their respective hospital premises due to his seemingly inappropriate actions; and does not dispute that he was on disciplinary probation with Respondent for engaging in similar misconduct only six months earlier. Nor does Petitioner allege or establish that similarly-situated younger employees were treated more favorably by Respondent.[6]

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5. Petitioner claims that he did not have an adequate opportunity to demonstrate pretext in the courts below, yet he fails to explain what opportunities he was denied. (Petition, p. 12). He was represented by legal counsel throughout the proceedings; he was afforded ample discovery and, in fact, engaged in the discovery process; he submitted a written response and deposition testimony in opposition to Respondent's motion for summary judgment; and the lower courts considered his arguments and record "evidence." Clearly, he was given ample opportunity to discover and present evidence of pretext if any such evidence existed.

6. In fact, the only other employee found to have violated Respondent's ethics policy in 1996 was likewise discharged. He was 34 years of age at that time. (R1-20-31-32).

Thus, the lower courts properly determined that Petitioner "failed to present evidence sufficient to cast doubt upon [Respondent's] legitimate, non-discriminatory reason." (App. to Petition, p. 17a). Accordingly, summary judgment was appropriately entered on his age claim. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (to survive a properly supported motion for summary judgment, the plaintiff must present "affirmative evidence" from which a jury might return a verdict in his favor); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

D. The lower courts properly analyzed this case under the McDonnell Douglas evidentiary framework

Petitioner argues that this Court should grant his petition for writ so as to determine whether "Title VII's McDonnell Douglas framework is applicable to ADEA cases." (Petition, p. 11). He concedes that courts have assumed that it does so, and, of course, federal courts, including this Court, have consistently so held. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) ("In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in McDonnell Douglas.") (footnote omitted); *Hazen Paper Co.*, 507 U.S. at 604 (applying McDonnell Douglas proof scheme to ADEA case). This is so because "[t]he ADEA and Title VII share common substantive

features and also a common purpose." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995). In fact, "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Thus, it is only logical that the same basic burdens and presentation of proof apply to ADEA cases. Afterall, the ultimate issue in such cases is the same: did the defendant intentionally discriminate against the plaintiff. The lower courts, therefore, consistent with settled law and sound policy, properly applied the *McDonnell Douglas* proof scheme to the instant case. *See, e.g., Hazen Paper Co.*, 507 U.S. at 604; *Walker*, 53 F.3d at 1556.

In fact, Petitioner has failed to explain why a different evidentiary framework should be applied or how he has been harmed by the application of the *McDonnell Douglas* framework to his case. To be sure, there is no cause for this Court to address this novel and completely undeveloped issue, which was never raised below and which is not supported by any legal authority.

III.

THE LOWER COURTS CORRECTLY DETERMINED THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S SECTION 301 CLAIM

To establish his Section 301 claim under the LMRA, Petitioner was required to prove both that his discharge was a violation of the collective bargaining agreement and that the union breached its duty of fair representation. *E.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). As the lower

courts found, although the evidence supporting a breach of contract is "tenuous at best," the evidence supporting a breach of the duty of fair representation is entirely lacking. (App. to Petition, p. 18a). Nevertheless, just as he did before the lower courts, Petitioner is arguing that the union breached its representation duty by failing to arbitrate his grievance allegedly due to his lack of membership status and President Long's personal animosity towards him. (Petition, pp. 15-14). However, there is simply no evidence to support his theories.

As an initial matter, the union's failure to arbitrate Petitioner's grievance does not in itself constitute a breach of its duty of fair representation. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967) (the duty does not provide an employee with the absolute right to have any grievance taken to arbitration). In fact, it has long been recognized that

> in its role as the exclusive agent for all employees in the bargaining unit, the union has the power to sift out frivolous grievances, to abandon processing of a grievance which it determines in good faith to be meritless and to settle disputes with the employer short of arbitration.

Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167, 171 (5th Cir. 1971); *see also Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th Cir. 1982) ("[T]he duty of fair representation is not a straightjacket which forces unions to pursue grievance remedies under the collective bargaining agreement in every case where an employee has a complaint against the company."). To the contrary, "[a] breach of the statutory duty of fair representation occurs only when a

union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190.

As to Petitioner's allegation that the union discriminated against him based on his membership status, the evidence refutes any such notion. Indeed, the

> uncontroverted evidence demonstrat[es] that [Petitioner's] non-membership was not even discussed or considered when the Executive Board voted unanimously not to arbitrate the grievance. (Clearman Aff. 5-6; Hyslop Aff. Par 5; Pl's Resp. Ex. K). Rather, that decision was based on the Board's evaluation of [Petitioner's] claim, following the Union's independent investigation of [Respondent's] termination decision and [Petitioner's] presentation to the Board. (Clearman Aff.; Hyslop Aff.; Pl.'s Resp. Ex. K).

(App. to Petition, p. 20a).

Likewise, there is no evidence to support the allegation that Petitioner was denied arbitration because of President Long's feelings toward him. In fact, notwithstanding Petitioner's contrary unsupported assertions (Petition, pp. 6 n.2, 14), there is no evidence that President Long harbored ill feelings toward Petitioner at all. Even Petitioner conceded that the two men had had no problems since a particular incident in 1992 or 1993 and that he expressly requested President Long's involvement in the grievance process on and after July 31, 1996. (R3-22-30-35-126-142). In any event, even assuming the existence of an acrimonious

relationship between Long and Petitioner, there still exists no evidence that said relationship was the reason for the Executive Board's decision not to arbitrate his grievance. As put by the District Court,

> such an assumption does not allow the Court to infer a conspiracy among the Executive Board members, who voted unanimously not to arbitrate [Petitioner's] grievance without Long. Long did not participate in that vote.

(App. to Petition, p. 19a). Here again, the uncontroverted evidence establishes that President Long's personal feelings played no role in the union's decision not to arbitrate.[7]

The District Court and Court of Appeals thus correctly determined that Respondent was entitled to summary judgment on Petitioner's Section 301 claim. The evidence, rather than establishing a breach of duty, establishes only that the union, consistent with its practice, decided not to arbitrate a meritless grievance after independently investigating the factual circumstances that resulted in the discharge and subsequent grievance; after properly processing the grievance pursuant to the labor agreement; and after weighing all of the evidence before voting unanimously not to arbitrate.

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7. Petitioner also makes the bald assertion that he "was forced to agree to have several of the grievance processes combined in exchange for an arbitration hearing." (Petition, p. 14). He cites no evidence to support this claim and has not refuted President Long's and Board Member Clearman's affidavit testimony to the contrary. (R1-20-78-79; R1-20-85-86). Nor does he explain why he made a presentation to the Executive Board urging the members to vote to proceed with arbitration if he already had been assured of arbitration by President Long. The lower courts properly dismissed this frivolous allegation.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 21, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-08739

JOHN C. BRAZELL,

Plaintiff-Appellant,

versus

SAVANNAH ELECTRIC AND POWER COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BIRCH, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant JOHN C. BRAZELL is denied.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE